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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL,

Petitioner,

v.

ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD,

Respondent;

BMGV, LLC,

Real Party in Interest.

A155130

(Alcoholic Beverage Control
Appeals Bd. No. AB-9568a)

Petitioner Department of Alcoholic Beverage Control (the Department) issued a 45-day suspension of an on-sale general public premises license held by real party in interest BMGV, LLC, doing business as “Atmosphere” (also referred to hereinafter as BMGV or Club Atmosphere). The discipline was imposed based on a sustained accusation that BMGV was maintaining Club Atmosphere as a disorderly house (Bus. & Prof. Code, §§ 24200, subd. (b), 25601)¹ and creating a law enforcement problem such that continuation of the license would be contrary to public welfare or morals (Cal. Const., art. XX, § 22; § 24200, subd. (a)).

¹ All further unspecified statutory references are to the Business and Professions Code.

BMGV appealed its license suspension and respondent Alcoholic Beverage Control Appeals Board (the Board) initially annulled the Department's decision and recommended dismissal of the accusation on the ground of insufficient evidence. Thereafter, we granted the Department's petition for writ review and annulled the Board's decision after finding there was sufficient evidence to sustain the accusation. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (Aug. 28, 2017, A150055), opn. mod. Sept. 19, 2017 [nonpub. opn.].) We remanded the case to the Board to consider BMGV's remaining challenges.² (*Id.* at p. 15.) The Board once again annulled the Department's decision, and, in addition, now recommended dismissal of the accusation on the ground of selective prosecution. We granted the Department's petition for writ review of the Board's decision. (§ 23090.)

Having reviewed the parties' contentions, we conclude that BMGV failed to produce the necessary evidence establishing a selective prosecution claim. Accordingly, we annul the Board's decision and reinstate the Department's decisions sustaining the accusation and denying BMGV's motion to dismiss for selective prosecution. On remand, the Board should address, in the first instance, BMGV's challenge to the imposed discipline.

² In its petition, the Department argues that although we remanded the case to the Board, the remand should have been made to the Department for further proceedings or reconsideration under section 23090.3. That statute provides that following the Board's administrative review, "the court shall enter judgment either affirming or reversing the decision of the department, or the court may remand the case for further proceedings before or reconsideration by the department." However, contrary to the Department's argument, the statute does not preclude this court from remanding the matter to the Board for further proceedings when appropriate. (See, e.g., *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2017) 18 Cal.App.5th 541, 548 [appellate court annulled the Board's decision and remanded the matter to the Board for further proceedings consistent with opinion reinstating license suspension]; *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2017) 7 Cal.App.5th 628, 643 [accord].)

FACTS³

A. Background

BMGV operated the licensed premises, as Club Atmosphere, on Broadway Street (Broadway), from August 28, 2008, to December 13, 2014.⁴ Broadway is in an urban entertainment district with many nightlife establishments. There were nine other establishments that were licensed to sell alcohol on the same block as Club Atmosphere, and two of the clubs were adjacent to Club Atmosphere. Several other establishments licensed to sell alcohol were within walking distance of Club Atmosphere. By 2014, Club Atmosphere was the largest nightclub in the area. Over the course of 2014, Club Atmosphere operated four nights each week (Thursday through Sunday) and served that year approximately 40,000–50,000 patrons; plus an additional 2,000–6,000 patrons attended private events.

In early 2015, the Department filed a two-count accusation, to which BMGV filed a notice of defense. The accusation included 52 subcounts based on police reports describing incidents of public intoxication, resisting arrest, fighting, as well as assault and battery, occurring between October 2013 and December 2014. The Department sought to discipline BMGV for (a) operating the premises as a disorderly house (count 1); and (b) creating a law enforcement problem such that continuation of the license would be contrary to public welfare or morals (count 2). (Cal. Const., art. XX, § 22; §§ 24200, subds. (a), (b), 25601.) Following an evidentiary hearing before an administrative law judge (ALJ), the Department adopted the ALJ's findings and recommendations to sustain

³ Our statement of facts is taken in part from our prior decision and limited to those facts necessary to resolve this writ proceeding. Additionally, both the Department and BMGV have filed requests asking us to take judicial notice of certain Board decisions. “[A]lthough we are not bound by the . . . Board’s decisions,” we may “take judicial notice” of “their reasoning for persuasive value.” (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, *supra*, 7 Cal.App.5th at p. 639.) In the absence of opposition, we grant the parties’ separate requests for judicial notice.

⁴ Club Atmosphere closed on December 13, 2014, and, after remodeling, reopened as Club Hue in July 2015.

the accusation and suspend BMGV's license for 45 days (with 15 days conditionally stayed subject to one year of discipline-free operation).

On the Department's previous appeal, we reversed the Board's finding that the accusation should be dismissed for lack of sufficient evidence. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, *supra*, A150055, at pp. 30-31.) We concluded, in pertinent part, that based on a review of the record, the ALJ's recommendation to sustain the accusation was supported by 10 incidents in which BMGV's club patrons were either detained or arrested for public intoxication, resisting arrest, fighting, and assault and battery. (*Id.* at p. 30.) In so holding, we relied on *Coleman v. Harris* (1963) 218 Cal.App.2d 401, 404, wherein the court held that "because section 25601 'imposes the affirmative duty of maintaining lawfully conducted premises, it is unnecessary that the evidence show active participation on the part of the license holder in the acts which have rendered the premises injurious to the public morals.' " (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, *supra*, A150055, at p. 30.)

B. BMGV's Claim of Selective Prosecution

The Department now challenges the Board's setting aside of the ALJ's additional ruling denying BMGV's motion to dismiss for selective prosecution. In seeking dismissal of the accusation, BMGV claimed Club Atmosphere had been "targeted" for enforcement and "singled out for harassment" when its owner failed to accede to the request of certain members of the San Francisco Police Department (SFPD) to stop sponsoring events playing hip-hop music that attracted African-American patrons. Analyzing BMGV's claim using cases in the criminal context (*United States v. Armstrong* (1996) 517 U.S. 456, 469 (*Armstrong*); *Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 831-832 (*Baluyut*)), the ALJ found, in pertinent part, that the selective prosecution claim failed at the threshold because BMGV had not provided evidence that similarly situated licensed clubs on Broadway, with a record of law enforcement problems that BMGV had with the SFPD, had been treated differently by the Department.

The Board reversed, finding that Club Atmosphere had been treated differently than other clubs on Broadway because it appeared that Club Atmosphere “was singled out for unique surveillance and enforcement, even though other clubs on Broadway (that did not feature hip-hop music) had problem patrons similar to, or worse than, those at [Club] Atmosphere.” The Board also found relevant BMGV’s statistical “evidence that African Americans comprise: [¶] • 6% of the San Francisco population, [¶] • 47% of all the people arrested by the SFPD in 2014, and [¶] • 58.3% of the individuals arrested or detained in the incidents underlying the 52 subcounts of the accusation.” Having found BMGV had presented a “prima facie” case of selective prosecution, the Board further found the burden had shifted to the Department to present evidence demonstrating a compelling reason to justify its “selective” prosecution of the accusation. Because the Department failed to produce any evidence that its prosecution was not based on the race of the Club Atmosphere’s patrons, the Board found BMGV had established its claim of selective prosecution as a matter of law and recommended dismissal of the accusation.

On August 24, 2018, the Department filed a timely petition for writ review challenging the Board’s decision. (§ 23090.) We granted the petition for review and heard oral argument. (§ 23090.1.)

DISCUSSION

I. BMGV’s Claim of Selective Prosecution

A. Applicable Law and Burdens of Proof

Initially, we agree with the ALJ and the Board that our review of BMGV’s selective prosecution claim is governed by criminal case law. “Although referred to for convenience as a ‘defense,’ a . . . claim of [selective] prosecution goes not to the nature of the charged offense, but to a defect of constitutional dimension in the initiation of the prosecution. [Citation.] The defect lies in the denial of equal protection to persons who are singled out for a prosecution that is ‘deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.’ [Citation.] When a [claimant] establishes the elements of [selective] prosecution, the action must be dismissed even if a

serious crime is charged unless [the prosecuting authorities] establish a compelling reason for the selective enforcement. [Citations.]” (*Baluyut, supra*, 12 Cal.4th at pp. 831–832.)

In reviewing BMGV’s claim of selective prosecution, we presume the Department filed the accusation against Club Atmosphere in good faith. (See *Armstrong, supra*, 517 U.S. at pp. 464–465.) We give the Department, as the enforcement agency empowered to file an accusation against a licensee, the same deference as a prosecutor in the criminal context. Like a prosecutor, the Department’s decision to file an accusation against a licensee “rests in part” on its ability to assess the “ ‘strength of the case, the . . . general deterrence value, the [Department’s] enforcement priorities, and the case’s relationship to the [Department’s] overall enforcement plan,’ ” which is not “ ‘readily susceptible to the kind of analysis the courts are competent to undertake.’ ” (*Id.* at p. 465.) Additionally, our deference to the Department “stems from a concern not to unnecessarily impair the performance of [the Department’s] function. ‘Examining the basis of [an accusation] delays the [enforcement] proceeding, threatens to chill . . . enforcement by subjecting the [Department’s] motives and decisionmaking to outside inquiry, and may undermine [the Department’s] effectiveness by revealing [its] enforcement policy.’ ” (*Ibid.*) Thus, “ ‘so long as the [Department] has probable cause to believe that the [licensee] committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring . . . , generally rests entirely in [its] discretion.’ [Citation.] [¶] Of course, [the Department’s] discretion is ‘subject to constitutional constraints.’ [Citation.] One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment, [citation], is that the decision whether to prosecute may not be based on ‘an unjustifiable standard such as race, religion, or other arbitrary classification,’” (*Id.* at pp. 464–465.)

Drawing “on ‘ordinary equal protection standards,’ ” and to dispel the presumption that the Department had not violated equal protection, BMGV, as a claimant of selective prosecution, has the burden of presenting “ ‘clear evidence’ ” demonstrating that “the [Department’s] prosecutorial policy ‘had a discriminatory effect and that it was

motivated by a discriminatory purpose.’ [Citations.]” (*Armstrong, supra*, 517 U.S. at p. 465.) And, “[t]o establish a discriminatory effect in [this] case,” BMGV had the burden of showing that the Department has not prosecuted similarly situated⁵ licensed clubs that had patrons of a different race that caused a law enforcement problem. (*Ibid.*)

Here, the Board found that what was at issue was not selective prosecution by the Department but selective enforcement by certain members of the SFPD. However, while the factual analysis is distinct, “the legal standards for examination of the issue of selective prosecution and enforcement are the same To prove discriminatory effect in a race or ethnicity-based selective prosecution claim, a [claimant] must make a credible showing that a similarly-situated individual of another race could have been prosecuted for the offense for which the [claimant] was charged. If such a claim is based on the investigative phase of the prosecution, however, the [claimant] must instead make a credible showing that a similarly-situated individual of another race could have been, but was not, . . . referred for . . . prosecution for the offense for which the [claimant] was . . . referred.” (*U. S. v. Duque-Nava* (D.Kan. 2004) 315 F.Supp.2d 1144, 1152, fn. 15, citing *Armstrong, supra*, 517 U.S. at p. 465 and *U.S. v. James* (10th Cir. 2001) 257 F.3d 1173, 1179 (*James*).)

B. Analysis

We conclude, as did the ALJ (and adopted by the Department), that BMGV’s claim of selective prosecution failed at the outset in the absence of necessary evidence showing that the Department treated similarly situated licensed clubs differently on the

⁵ The term “ ‘similarly situated’ person for selective prosecution purposes” has been defined as “one who engaged in the same type of conduct, which means that the comparator committed the same basic crime in substantially the same manner as the [claimant] so that any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government’s enforcement priorities and enforcement plan and against whom the evidence was as strong or stronger than that against the [claimant].” (*U.S. v. Smith* (11th Cir. 2000) 231 F.3d 800, 810.)

basis of race.⁶ The fact that Club Atmosphere may have been treated differently than other licensed clubs is not sufficient. BMGV had the obligation to show that any different treatment was based “ ‘on an invidiously discriminatory basis’ ” such as race. (*Baluyut, supra*, 12 Cal.4th at p. 834.) In the absence of the required evidence, the ALJ properly denied BMGV’s motion to dismiss for selective prosecution.

In so concluding, we find the Board’s approach to BMGV’s selective prosecution claim was not appropriate. It apparently accepted BMGV’s incorrect argument that “[t]he burdens and order of proving a claim of selective prosecution have, in practice, followed those first established for racial discrimination in employment cases by *McDonnell Douglas Corp. v. Green* [(1973) 411 U.S. 792 (*McDonnell Douglas*)][⁷] and subsequently applied in many other contexts involving discrimination.” In support of its argument that the Board’s analysis under the burden-shifting framework of *McDonnell Douglas* was proper, BMGV cites as an example *People v. Johnson* (1983) 30 Cal.4th 1302, 1310–1311, in which our Supreme Court discussed the high court’s citation of

⁶ To the extent BMGV argues its claim is one of selective enforcement based on the conduct of certain members of the SFPD, such a claim would similarly fail at the threshold for lack of evidence that similarly situated licensees were treated differently on the basis of race. Thus, we do not address and express no opinion on the purported conduct of certain members of the SFPD as described by the Board in its decision.

⁷ In *McDonnell Douglas*, the high court enunciated the “order and allocation of proof in a private, non-class action challenging employment discrimination” under Title VII of the Civil Rights Act of 1964 (78 Stat. 253, 42 U.S.C. § 2000e et seq.). (*McDonnell Douglas, supra*, 411 U.S. at p. 800.) The complainant “must carry the initial burden . . . of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.” (*Id.* at p. 802, fn. omitted.) “The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.” (*Ibid.*) Once the employer meets the complainant’s prima facie case of racial discrimination, the burden shifts back to the complainant “to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.” (*Id.* at p. 805.)

Board found, because such evidence is uniquely within the knowledge of the SFPD and the Department. Evidence of discriminatory effect was readily available to BMGV by way of a discovery motion seeking SFPD reports of incidents at other licensed clubs and the Department's record of prosecutions filed against other licensed clubs. And, indeed, the two cases of which BMGV asks us to take judicial notice specifically confirm it is the licensee's burden to produce evidence (available through discovery motions) demonstrating that the referring authority and/or the Department are treating similarly situated licensees differently on the basis of race. (See *Meacham v. Department of Alcoholic Beverage Control* (Appeals Board July 12, 2000) AB-7032 at pp. 11–12 <<https://abcab.ca.gov/wp-content/uploads/sites/27/2017/06/7032.pdf>>; *Meacham v. Department of Alcoholic Beverage Control* (Appeals Board Feb. 21, 2002) AB-7032a at pp. 4–6 <<https://abcab.ca.gov/wp-content/uploads/sites/27/2017/06/7032a.pdf>>.)

We also reject the Board's assertion that BMGV's purported evidence of discriminatory animus of certain members of the SFPD shifted the burden to the Department to produce evidence demonstrating that its reason for filing an accusation was not based on the race of Club Atmosphere's clientele. As we have previously noted, and our highest court has recognized, "the decision to prosecute is particularly ill-suited to judicial review." (*Wayte v. United States* (1985) 470 U.S. 598, 607.) Putting the burden on the Department to explain its reasons for prosecuting certain licensees and not other licensees "threatens to chill" enforcement of the law by subjecting the Department's "motives and decisionmaking to outside inquiry, and may undermine [its] effectiveness by revealing [its] enforcement policy." (*Ibid.*) It is for that reason we presume the Department has not engaged in discriminatory conduct, and there is no shifting of the burden to the Department to produce evidence that its reason for filing an accusation was not based on race. (See *Armstrong, supra*, 517 U.S. at p. 465.) Instead, it was BMGV's burden to produce evidence to support its claim of selective prosecution, which it failed to do in this case. Specifically, it produced no evidence of the races of the patrons of other licensed clubs, that SFPD officers were not detaining or arresting problem patrons of different races at other licensed clubs, or that the Department was not filing

accusations against other licensed clubs based on patrons of different races causing law enforcement problems.

In sum, we conclude the ALJ properly denied BMGV's motion to dismiss for selective prosecution. BMGV failed to overcome the strong presumption of regularity applied to the Department's decision to file an accusation by producing evidence of different race-based treatment of similarly situated licensed clubs. Accordingly, we must annul the Board's decision and reinstate the Department's decisions sustaining the accusation and denying BMGV's motion to dismiss for selective prosecution.

II. BMGV's Claim of Appropriateness of Imposed Discipline

Because the Board recommended dismissal of the accusation, it did not rule on BMGV's additional contention that the imposed discipline was "grossly disproportionate" when compared to discipline imposed in other cases. We find the Board should resolve this outstanding issue in the first instance. Our decision should not be read, and we express no opinion on, how the Board should rule on the issue.

DISPOSITION

The Board's decision is annulled. The Department's decisions, sustaining the accusation and denying BMGV's motion to dismiss for selective prosecution, are reinstated. The case is remanded to the Board for further proceedings consistent with this opinion. The parties shall bear their own costs on this writ review.

Wiseman, J.*

WE CONCUR:

Siggins, P. J.

Fujisaki, J.

A155130/Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.

* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.